



## TRADE PRACTICES ACT 1974

### UNDERTAKING TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION GIVEN FOR THE PURPOSES OF SECTION 87B

BY

**WILD GEAR PTY LTD ACN 009 128 401 AS TRUSTEE FOR WILD GEAR UNIT TRUST**

**MOUNTAIN DESIGNS PTY LTD ACN 010 021 557**

**OUTDOOR DESIGNS PTY LTD ACN 051 131 938**

**GLYNDAHIGH PTY LTD ACN 069 358 818**

**PACK IMPORTS PTY LTD ACN 010 021 557**

**(Collectively called the 'Group')**

## BACKGROUND

### Group Structure

1. The Group retails outdoor adventure products throughout Australia and has its own manufacturing facility in Queensland. A brief outline of the companies in the Group and their functions is as follows:

#### **Wild Gear Pty Ltd as trustee for Wild Gear Unit Trust**

- Is the holding company for other companies in the Group.
- Operates company owned 'Mountain Designs' retail stores selling Mountain Designs branded products and other outdoor adventure products at:
  - 377 Little Bourke Street, Melbourne Victoria
  - 7 Lonsdale Street, Braddon ACT
  - 203 Rundle Street, Adelaide SA
  - 105 Albert Street, Brisbane, QLD
  - 499 Kent Street, Sydney, NSW
  - 970-972 White horse Road, Box Hill, VIC
  - 310 Church Street, Parramatta NSW
  - 595-597 Kingsway, Miranda NSW
  - 654 Glenferrie Road, Hawthorn, VIC
- Acts as a franchisor to franchised Mountain Designs stores at:

- 148 Wickham Street, Fortitude Valley, QLD
- Shop 3 Queensgate Centre, William Street, Fremantle, WA
- 224 Barry Parade, Fortitude Valley, QLD
- 190 Katoomba Road, Katoomba, NSW
- 862 Hay Street, Perth, WA
- Lot 9 Princes Highway, Traralgon, VIC

#### **Outdoor Designs Pty Ltd**

- Now dormant
- Previously franchisee of Mountain Designs stores at Sydney and Parramatta.

#### **Mountain Designs Pty Ltd**

- Manufacturer of outdoor adventure products under 'Mountain Designs' label for supply to Mountain Designs stores.

#### **Glyndahigh Pty Ltd**

- 50% owned by Wild Gear Pty Ltd as trustee for Wild Gear Unit Trust
- 50% owned by other interests.
- Operator of a franchised Mountain Designs store at 148 Wickham Terrace, Fortitude Valley, Queensland.

#### **Pack Imports Pty Ltd**

- 50% owned by Wild Gear Pty Ltd as trustee for Wild Gear Unit Trust.
- owned by other interests.
- As yet inactive.
- Proposed - will import backpacks to sell through Mountain Designs stores and other retail outlets.

#### **Description of Conduct Investigated by the Commission**

2. Mainpeak Pty Ltd (ACN 009 468 008) has from 8 February 1993 to 8 February 1996 operated a Mountain Designs store under franchise from Wild Gear Pty Ltd. The Mainpeak stores are located at:
  - 31 Jarrad Street, Cottesloe, Western Australia, 6011
  - 654b Glenferrie Road, Hawthorn, Victoria, 3122
3. The franchise agreement governing that franchise contained a clause (clause 52(vi)) allowing the franchisee to continue to sell Mountain Designs products for up to 60 days after termination of the franchise agreement on the proviso that those products are sold within 10 per cent of the then current resale price ('the proviso').

4. The Australian Competition and Consumer Commission ('the Commission') has examined the terms of the proviso and by a letter dated 11 April 1996 advised McCullough Robertson as solicitors to the Group that it had reached the view that the proviso contravenes Section 48 of the *Trade Practices Act, 1974* ('the Act').

### **Conduct Ceased**

5. Solicitors for Wild Gear Pty Ltd have examined each of the current franchise agreements and have been satisfied that clause 52(vi), or any other clause having a similar effect, has not been included in any franchise agreement other than the agreement with Mainpeak Pty Ltd.
6. The franchise agreement with Mainpeak Pty Ltd expired on 8 February 1996 and the 60 day period referred to in the clause has also expired.
7. Wild Gear Pty Ltd has advised Mainpeak Pty Ltd that it will not seek to enforce the terms of the proviso to clause 52(vi).

### **UNDERTAKINGS**

Each of the companies in the Group undertakes for the purposes of Section 87B of the Act as follows:

8. That they will not engage in conduct that breaches Section 48 of the Trace Practices Act.
9. That they will delete or strike through the proviso in clause 52(vi) (or any clause with similar effect) in any franchise agreements it issues.
10. To provide to Mainpeak Pty Ltd a Deed by Wild Gear Pty Ltd confirming that no action will be taken by Wild Gear Pty Ltd in relation to the terms of the proviso to clause 52(vi).
11. To instruct McCullough Robertson, solicitors, to conduct a review of all franchise and supply agreements used by each Company in the Group to ensure that those agreements do not contain clauses that breach the terms of the Act. The Group must inform all franchisees that this review is being undertaken as part of its trade practices compliance program and that they will be contacted if any clauses are found in their respective franchise agreements that require amendment.
12. Within three months of signing this Undertaking to develop and submit to the Commission for its consideration a draft trade practices compliance program with the following characteristics and attributes and to have the following aims and objectives:

#### **Aim**

To create a culture of compliance within the Group and to prevent, so far as is reasonably possible, any contraventions of the Act by members of the Group or by its directors, employees or agents, and franchisees.

### **Policy**

The formal re-affirmation by the Group of a policy of strict compliance with the letter and spirit of the Act.

### **Compliance Infrastructure**

The appointment of Mr Stephen Bean (Group Chief Executive) to be responsible for implementation of the trade practices compliance program.

It is to be made known to all agents and servants of the Group, that it is expected that they comply with the Act and that written advice be provided to the Group's agents and servants, that where an employee of the Group breaches or causes a Company within the Group to breach the Act, or a franchisee to breach the Act, that the employee or agent will be formally counselled for that conduct and, if the conduct is repeated, may be dismissed from the Group.

The Group shall make its training program available to franchisees and shall, as far as it is able to do so, shall require its franchisees to comply with the Act.

### **Coverage**

The compliance program will cover all directors and sales staff of the Group. Information will be disseminated to franchisees regarding their rights and obligations under the Trade Practices Act.

### **Education Program**

Development and implementation of an education program based around the Commission's 'Best and Fairest' compliance training package calculated to have the relevant staff conversant with the provisions of the Act to a level where:

- (i) general sales staff can identify obvious contraventions of the Act and will have particular familiarity with the provisions dealing with misleading and deceptive conduct and false representations, and in particular Division 2 (Part V) of the Act;
- (ii) staff responsible for the management of individual stores have a general understanding of trade practices law and can identify obvious contraventions of the Act, with a particular emphasis upon provisions relating to consumer protection and restrictive trade practices law;
- (iii) staff responsible for management of the importing and manufacturing activities of the Group have a general understanding of trade practices law and can avoid obvious contraventions of the Act, and have a particular understanding of Part VA of the Act;

- (iv) staff responsible for negotiation and implementation of the Group's franchise agreements and the appointment of franchisees will have a general understanding of trade practices law to be able to identify any obvious contraventions of the Act in drafting and implementing franchise agreements; and
- (v) the Group Chief Executive can address more complex trade practices issues and identify issues which require referral to the Group's solicitors.

### **Implementation**

The Group will make whatever changes to the draft program that the Commission may reasonably require and will then prepare and submit to the Commission a trade practices compliance program which shall be a document comprising the draft program with all changes required by the Commission incorporated in it.

The Group will implement the trade practices compliance program within three months of the Commission approving that program, and that program will remain in force for a minimum period of five years from the signing of this undertaking.

The Group will have all future franchise agreements and supply agreements reviewed by its solicitors with a view to ensure that those agreements comply with the Act.

### **Review of Compliance**

At the end of each 12 month period following the signing of this undertaking, until the fifth anniversary of the signing of the Undertaking, an independent person to the Group will provide to the Commission a signed statement stating that it believes that the Group has implemented and maintained a trade practices compliance program in accordance with this Undertaking.

13. The group will apply by 14 July 1996 for registration with the Franchising Code Council Ltd and adhere to its Code of Conduct.

### **ACKNOWLEDGMENTS**

14. The Group acknowledges that the Commission will make this undertaking available for public inspection.
15. The Group further acknowledges that the Commission will from time to time publicly refer to this undertaking.
16. The Group further acknowledges that this undertaking in no way derogates from the rights and remedies available to any person arising from the alleged conduct.

17. Wild Gear Pty Ltd has full authority under the deed constituting the Wild Gear Unit Trust to enter into the undertaking.

Undertakings given this 9 day of JULY 1996.

THE COMMON SEAL of  
WILD GEAR PTY LTD is affixed in  
accordance with its Articles of  
Association in the presence of: )  
)  
)  
)



X *[Signature]*  
.....  
Director

X *[Signature]*  
.....  
Secretary

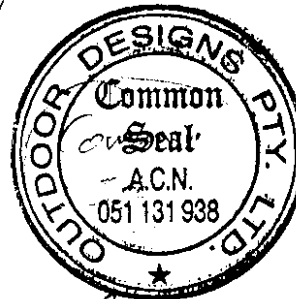
THE COMMON SEAL of  
MOUNTAIN DESIGNS PTY LTD is affixed in  
accordance with its Articles of  
Association in the presence of: )  
)  
)  
)



X *[Signature]*  
.....  
Director

X *[Signature]*  
.....  
Secretary

THE COMMON SEAL of  
OUTDOOR DESIGNS PTY LTD is affixed in  
accordance with its Articles of  
Association in the presence of: )  
)  
)  
)



*[Signature]*  
.....  
Director

X *[Signature]*  
.....  
Secretary

THE COMMON SEAL of  
GLYNDAHIGH PTY LTD is affixed in  
accordance with its Articles of  
Association in the presence of:

)  
)  
)  
)



X [Signature]  
Director

[Signature]  
Secretary

THE COMMON SEAL of  
PACK IMPORTS PTY LTD is affixed in  
accordance with its Articles of  
Association in the presence of:

)  
)  
)  
)



[Signature]  
Director

[Signature]  
Secretary

RHW:19729GC/V1

Accepted by the Australian Competition and Consumer Commission pursuant to  
Section 87B of the Trade Practices Act 1974

[Signature]

Chairman

This 17 day of July 1996

**PARTNERS**

Kerry Prior  
David Whitman  
David Searles  
Peter J Cox  
Michael Cunningham  
Brett Heading  
Tim Whitney  
Peter McKnoulty  
Ian Hughes  
Rodney Bell

Ian Hazzard  
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Peter Gill  
Jay Deeb  
Peter Stewart  
Mark Darwin  
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Damien Clarke  
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**McCULLOUGH**  
**ROBERTSON**  
S O L I C I T O R S

YOUR REFERENCE: PR 96/11  
OUR REFERENCE: RHW:PJM:WILD3800-039  
DIRECT LINE: 3233 8989

10 July 1996

The Regional Director  
Australian Competition & Consumer Commission  
3rd Floor  
Eastpoint Plaza  
233 Adelaide Terrace  
PERTH WA 6000

Dear Sir

**Wild Gear Pty Ltd**

We refer to our facsimile of earlier today and now enclose the original of our client's executed undertaking.

Yours faithfully

**McCULLOUGH ROBERTSON**  
M/15666/PMB2903/S12